SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 491

LEONA PEAK, PETITIONER

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

	Original	Print
Record from the United States District Court for the Eastern District of Tennessee	1	1
Complaint	1	1
Motion to dismiss	5	4
Memorandum opinion on motion to dismiss, Darr, J	5	5
Order of dismissal	8	7
Proceedings in the United States Court of Appeals for the 6th Circuit	9	7
Argument and submission (omitted in printing)	9	7
Judgment	9	7
Opinion, Simons, C. J	10	7
Petition for rehearing (omitted in printing)	13	9
Order denying petition for rehearing	14	9
Clerk's certificate (omitted in printing)	15	9
Order allowing certiorari	16	10

407854—58

1 In United States District Court for the Eastern District of Tennessee

Complaint

Filed on February 19, 1954

The plaintiff, Leona Peake, sues the defendant, United States of America, on a contract of National Service Life Insurance for Ten Thousand ($10,000.00) Dollars, and for cause of action states the following facts:

I

That plaintiff is a resident and a citizen of the United States of America, residing in Hamilton County, Tennessee, within the Southern Division of the Eastern District of Tennessee.

II

That jurisdiction of this Court is found in Sections 445 and 817, Title 38, of the United States Code, Annotated.

III

That during World War II, plaintiff's son, Oscar Charles Peake, Jr., was inducted into the military service of the United States, on April 29, 1943, and served in the Army until on or about July 30, 1943, when he disappeared, without intelligence or tidings concerning him since.

Plaintiff avers that the assured had attained the age of eighteen years; that he was devoted to his parents, to his young sister and other relatives, that he visited his home as often as he could and communicated with them regularly; that he did not have the training or ability to make a living alone or apart from his near relatives; that his personal habits were good, and that he was not dissolute or lacking in recognition or moral responsibility in any way.

That at the time of the disappearance of the assured he was a member of Company "B," 10th Infantry Training Battalion, Camp Wheeler, Georgia, and that his organiza-

2 tion on said date, or shortly thereafter, was en route to San Francisco; that the United States Army, ever since the disappearance of assured, has made every effort to locate him or to have intelligence or tidings of him; that the Federal Bureau of Investigation has also sought to locate him, and that plaintiff and his family have made every effort to locate him or to receive intelligence of him.

Plaintiff avers that the deceased had a policy of insurance in the American National Insurance Company, and in the case of Oscar C. Peake v. American National Life Insurance Co., No. 32168, in the Chancery Court of Hamilton County, Tennessee, on February 7, 1953, it was ordered, Adjudged and Decreed by the court that the deceased was eighteen years of age when he entered the military service of the United States; that he regularly communicated with his father and mother; that he returned to his home in Chattanooga to visit his parents when he was granted a leave of absence from military service, after which he returned to his post at Camp Wheeler, Georgia, and that the last communication or letter received by his parents or members of insured's family was on or about July 30, 1943, and that he disappeared from the military unit with which he was serving, and that diligent search was made by the military authorities but failed to account for his disappearance or whereabouts, and that diligent search and inquiry was made by the parents of the insured and members of his family, but that said search and inquiry disclosed no information or intelligence to account for his disappearance; and that the Federal Bureau of Investigation made diligent search and inquiry for the missing assured, but that its search and inquiry failed to disclose any information showing the reason for assured's disappearance or indicating his whereabouts, and that it appeared to the court that the insured had been absent and had not been heard from by those who ordinarily would have heard from him, for a period of more than seven years, and the court presumes and finds that the insured is dead and, under all the facts and circumstances disclosed by the evidence, finds and de-
3 crees that said insured died on or about July 30, 1943, the date of his mysterious and unexplained disappearance.

That during said period of military service in the Army of the United States, plaintiff's said son, Oscar Charles Peake, Jr., desiring to be insured against the risks of death and total and permanent disability, applied to the defendant for a policy of National Service life insurance, and was granted one for $10,000.00, Certificate No. N–10–661–104, effective May 1, 1943, in which plaintiff was named beneficiary, and that said certificate, as was the custom, was duly issued to plaintiff's son, under said number, and by the terms thereof the defendant agreed to pay to assured's beneficiary, in the event of death, said sum of $10,000.00; and in event of total and permanent disability was to waive premiums on said policy, incurred during the life of said insurance contract—as provided by the Acts of Congress.

IV

That during the life of said insurance contract, and while plaintiff's said son was in the military service of the United States of America, as aforesaid, and at the time of said disappearance, as aforesaid, and while said policy was in full force and effect, he became, was, and continued to be until his death, totally and permanently disabled from following continuously any substantially gainful occupation, as result of the following diseases, ailments and injuries: cholera, nervous trouble, mental trouble, St. Vitus Dance, general debility and weakness and despondency.

That by reason of the foregoing, plaintiff's said son became, and was totally and permanently disabled from engaging continuously in any substantially gainful occupation, and was entitled to a waiver of the premiums on said policy and to have said policy continue in full force and effect until his death; and plaintiff avers that under the circumstances of his disability and disappearance the law presumes and she avers that he died on or about July 30, 1943, and while the policy was in full force
4 and effect and plaintiff avers that on or about July 30, 1950, at the expiration of said seven years, she became entitled to the full proceeds of said policy as beneficiary therof, and to be paid the sum of $10,000.00.

That plaintiff made due application to the defendant, through the Veterans Administration, for the benefits accruing to her under said policy, and made due proof thereof and demanded payment of the aforesaid amount and to have said insurance contract construed as being in full force and effect at the time of assured's death, but the defendant has disagreed with said plaintiff as to her claim for the benefits under said policy and has wholly failed and refused to pay said sum, or any part thereof, or to treat said insurance as being in full force and effect at the time of the death of plaintiff's said son; and plaintiff was lawfully advised, on or about July 18, 1951, by Registered Mail, of the decision of the Veterans Administration, and that a disagreement existed, and plaintiff avers that at the time during which her application for said insurance was pending before the Veterans Administration, the seven year period of her son's unexplained absence tolled the statute of limitations, and that the six years statute of limitations has not yet expired, and that she is now entitled to collect said insurance in this court and cause.

V

Wherefore, the plaintiff, Leona Peake, prays that she be given a decree against the defendant, decreeing that the assured was totally and permanently disabled from engaging in any substantially gainful occupation at the time of his said disappearance, and that he was entitled to a waiver of premiums on said policy from and after his said disappearance, and that said policy was in full force and effect at the time of his death, on or about July 30, 1943, and that she is entitled to recover the full amount of said policy of National Life Insurance for $10,000.00, as provided by law, and that a proper allowance be made for the benefit of her attorneys, not to exceed ten per cent (10%) of the judgment, and for such other relief as the plaintiff may be entitled to in the premises.

Plaintiff prays for such processes, orders, decrees and judgments as may be necessary to bring the defendant before the court and to fully protect the interest of plaintiff on account of the aforesaid contract of insurance.

Plaintiff demands a jury to try the issues in this cause when joined.

JOHN S. WRINKLE,
C. G. MILLIGAN,
Hamilton National Bank Building,
Chattanooga, Tennessee,
Attorneys for Plaintiff.

In United States District Court

Motion to dismiss

Filed July 20, 1954

Comes the United States of America and moves the Court to dismiss the complaint of Leona Peake for the following reasons:

1. The court has no jurisdiction of the subject matter.
2. The complaint fails to state a claim upon which relief can be granted.

JOHN C. CRAWFORD, Jr.,
United States Attorney,
Address: 362 Federal Bldg., Chattanooga 2, Tenn.
JOHN P. DAVIS, Jr.,
Assistant U. S. Attorney.

In the United States District Court

Memorandum opinion on motion to dismiss

Filed February 10, 1955

For insufficiency of the claim for relief, the defendant has filed a motion to dismiss the plaintiff's action which was instituted for recovery under a National Service Life Insurance policy.

6 Material parts of the complaint set out that the plaintiff's son, Oscar Charles Peake, Jr., was inducted into the military service of the United States on April 29, 1943, and served in the army until on or about July 30, 1943, when he disappeared from Camp Wheeler, Georgia; that there has been no evidence concerning his existence or whereabouts since; that during the period of his military service he acquired a policy of insurance for $10,000 under the provisions of the National Service Life Insurance Act, which policy was effective May 1, 1943, in which plaintiff was named as beneficiary; that pursuant to a suit in a local equity court a judgment was entered on February 7, 1953, in which the court announced that the soldier was presumed to be legally dead and adjudged that his death occurred on or about July 30, 1943, the date of the mysterious and unexplained disappearance; that before the issuance of the policy the soldier had become totally and permanently disabled and that his ailments and injuries were, "Chorea, nervous trouble, mental trouble, St. Vitus Dance, general debility and weakness and despondency"; that the plaintiff made due application to the Veterans Administration for the benefits under the policy, but the defendant disagreed and declined to pay; and that the seven year period of her son's unexplained absence tolled the statute of limitations.

The Plaintiff's right of recovery depends on whether the adjudication of the state court declaring him to be dead as of July 30, 1943, is effective under federal law. Necessarily the judgment of the state court was based upon Tennessee statutory law. Williams Code of Tennessee, Vol. 5, pocket part, Chapter 5, particularly sections 8407.10 (1) and 8407.19 (2).

The Court reaches the conclusion that the judgment of the state court has no efficacy in support of plaintiff's claim.

Under the general provisions pertaining to benefits under the law administered by the Veterans Administration, there is provided a definite prohibition against any state law being ap-

7 plicable for presumption of death. Title 38 U. S. C. A., section 32a. The same provision is carried into the National Service Life Insurance Act itself, codified at Title 38 U. S. C. A., section 810. The language is so plain that no one can err thereby and is as follows: "No State law providing for

presumption of death shall be applicable to claims for National Service Life Insurance."

The general provisions at said section 32a and in the National Service Life Insurance Act, at said section 810, provide that unexplained absence for seven years will presume death as of the date of the expiration of such period. Therefore, the presumption of death of this soldier would have to be on or about July 30, 1950, the end of seven years after his disappearance.

There is no allegation that the soldier made application for waiver of payment of premiums because of total disability within a year after August 1, 1946 and, in fact, there is no allegation that he ever made application to the Administrator for a waiver. Therefore, if it could be inferred that the plaintiff made application for waiver when she made application for the payment of the insurance, such action would not bring the plaintiff into the right of benefits under the Act. Scott v. United States (5th Circuit 1951), 189 F. 2d 863, certiorari denied 342 U. S. 787, 96 Law Ed. 660; Hendricks v. United States (D. C. E. D. Tenn.), 94 F. Supp. 142.

In addition there is no allegation in the complaint that the insured did not make timely application for waiver of premium due to circumstances beyond his control, or that the Administrator granted such waiver under such circumstances.

The law concerning waiver because of disability is found in the Act, as codified, in Title 38 U S. C. A., section 802 (n).

The Court was concerned as to why there would be put into the National Service Life Insurance Act the provisions for presumption of death after seven years absence, but at least one reason could be that a soldier might have been released from paying premiums because of permanent and total disability and thereafter presumption of death set up whereby a beneficiary would be entitled to the insurance.

8

In this case, under the Act itself as heretofore pointed out, this soldier, assuming the allegations of the complaint to be true, would be presumed to be dead as of July 30, 1950. The soldier not having made the required application for waiver of payment of premiums because of total disability and having same granted for future or past premiums, and not having alleged any facts that would excuse the making of the timely application, this insurance policy lapsed in 1943 and is not effective.

The defendant's motion is granted and the case is dismissed at plaintiff's costs.

Order accordingly.

(S) LESLIE R. DARR,
United States District Judge.

In United States District Court

Order of dismissal

Filed February 15, 1955

On motion of the United States Attorney and for good and sufficient causes to the Court appearing, as set forth in a memorandum this day filed,

It is ordered that this case be, and the same is hereby, dismissed at the plaintiff's cost.

Approved for entry:

LESLIE R. DARR,
Judge.

9 In United States Court of Appeals for the Sixth Circuit

Argument and submission, February 2, 1956 [omitted in printing].

In United States Court of Appeals

Judgment

Filed February 14, 1956

Appeal from the District Court of the United States for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

10 No. 12511

In United States Court of Appeals For the Sixth Circuit

LEONA PEAK, APPELLANT

v

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, SOUTHERN DIVISION

Opinion

February 14, 1956

Before SIMONS, Chief Judge, ALLEN and MILLER, Circuit Judges.

SIMONS, Chief Judge. The appellant was the beneficiary in a National Service Life Insurance policy issued to her soldier son. Her suit to recover on the policy was dismissed on the ground that the Court had no jurisdiction of the subject matter and that her complaint failed to state a claim upon which relief could be granted. The basic facts are not in dispute.

Oscar Charles Peak, Jr., the son, was inducted during World War II into the military service of the United States on April 29, 1943. On July 30th of that year, after his unit was ordered to proceed from Camp Wheeler, Georgia to San Francisco, he disappeared and all efforts made by the Army, the FBI, and his family to locate him proved futile. On February 7, 1953, the Chancery Court of Hamilton County, Tennessee, in a suit upon a commercial policy, decreed that not having been heard from for more than seven years he died on or about the date of his disappearance, July 30, 1943. The appellant made due application to the Veterans' Administration, in 1951, for the benefits accruing to her under the policy. Her claim was denied and she brought
11 suit against the Government on the policy on February 29, 1954, based upon the presumption that more than seven years having expired since the insured was last heard from, he was now dead and that the death occurred as of the date of his disappearance, July 30, 1943. It is conceded that the insured did not make timely application for waiver of premium due to circumstances beyond his control, and that no one made such application on his behalf. The District Court held that his policy had lapsed.

The appellant alleges that during the life of the policy, and before the soldier's disappearance, her son was afflicted with chorea, nervous trouble, mental trouble, St. Vitus Dance, general disability, and weakness and despondency; that from his condition at that time a presumption arose that he died on or about July 30, 1943. She, therefore, contends that she became entitled to the full proceeds of the policy.

Title 38, Sec. 810, U. S. C. A., provides:

"No State law providing for presumption of death shall be applicable to claims for National Service Life Insurance. If evidence satisfactory to the Administrator is produced establishing the fact of the continued and unexplained absence of any individual from his home and family for a period of seven years, during which period no evidence of his existence has been received, the death of such individual as of the date of the expiration of such period may, for the purpose of this subchapter, be considered as sufficiently proved."

It will be noted that the above Section permits a finding that, after the lapse of seven years of unexplained absence, the insured

is dead. It raises no presumption, however, as to the time of his death. The courts have held that the trier of facts may infer that he died before the expiration of the seven years, if it appears that within that period he had encountered some specific peril or come within the range of some impending or imminent danger which might reasonably be expected to destroy life. Davie v. Briggs, 97 U. S. 628, or the time may be shortened by proof of facts and circumstances connected with disappearance as would show death at an earlier date. Fidelity Mutual Life Assurance v. Mettler, 185 U. S. 308.

The complaint herein alleges no circumstances sufficient to support an inference that at the time of the insured's disap-
12 pearance he was in danger or peril and his infirmities if proved are not such as to support an inference that he died while the policy was in force or during the period that the policy could have been revived by a waiver of premiums timely sought. We agree with the decision of the district judge that the claim states no cause of action and, in any event, is barred by limitation. Wherefore, the judgment of the court must be, and it is,

Affirmed.

13 Petition for rehearing covering 5 pages filed March 3, 1956, omitted from this print.

It was denied, and nothing more by order of March 12, 1956.

14 In United States Court of Appeals

Order denying rehearing

March 12, 1956

The petition for rehearing is denied.

15 [Clerk's certificate to foregoing paper omitted in printing.]

16 Supreme Court of the United States

No. 22 Misc. —, October Term, 1956

LEONA PEAK, PETITIONER

vs.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

Order allowing certiorari

October 8, 1956

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 491 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
NOV 26 1956
JOHN T. FEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 491

LEONA PEAK,

Petitioner,

vs.

UNITED STATES OF AMERICA

PETITIONER'S BRIEF

JOHN S. WRINKLE,
1521 Hamilton National Bank Bldg.,
Chattanooga, Tennessee,
Counsel for Petitioner.

Of Counsel:

C. G. MILLIGAN,
Hamilton National Bank Bldg.,
Chattanooga, Tennessee.

INDEX

Subject Index

	Page
Petitioner's Brief	1
Opinions Below	1
Jurisdiction of this Court	1
Questions Presented	2
Statement of the Case	4
Brief and Argument in Support of Petition	5
Conclusion	13

Table of Cases Cited

Davie v. *Briggs*, 97 U.S. 628	6
Fidelity Mutual Life Assurance Ass'n. v. *Mettler*, 185 U.S. 308	6
Howard v. *United States*, 28 Fed. Supp., 985	10
Knight v. *Napean* (5 Barn and Adol. 86)	9
Mutual Life Ins. Co. of New York v. *Hamilton*, 143 Fed. (2d) 726	6, 10
New York Life Ins. Co. v. *Nashville Trust Co.*, 159 S.W. (2d) 81	12
United States v. *Hayman*, 62 Fed. (2d) 118	6, 10
United States v. *Willhite*, 219 F. (2d) 343	6, 10

Statutes Cited

Title 28, U.S.C.A., Section 1254 (1)	2
Title 38, U.S.C.A., Sections 445, 817	1
Title 38, U.S.C.A., Section 810	4, 5, 13

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 491

LEONA PEAK,

Petitioner,

vs.

UNITED STATES OF AMERICA

PETITIONER'S BRIEF

MAY IT PLEASE THE COURT:

Opinions Below

Opinion of the District Court for the Eastern District of Tennessee, Southern Division, is reported in 138 Fed. Sup. 810 and Tr. 5-6.

Opinion of the Circuit Court of Appeals, Sixth Circuit, is reported in 229 Fed. (2d) 503 and Tr. 8-9.

Jurisdiction of This Court

The plaintiff filed her complaint in the United States District Court on February 19, 1954 (Tr. 1-4). On motion of the defendant, judgment was entered in the District Court dismissing her suit, on February 15, 1955 (Tr. 4

and 7). The opinion and judgment of the court below was affirmed by the Circuit Court of Appeals on February 14, 1956 (Tr. 7). A timely petition to rehear was filed on March 3, 1956, and was denied on March 12, 1956 (Tr. 9). A timely petition for certiorari was filed in this court on May 12, 1956, and was granted on October 8, 1956 (Tr. 10).

The jurisdiction of this court is invoked under Sections 445 and 817 of Title 38, United States Code Annotated, relating to suits on War Risk Insurance and National Service Life Insurance; and Title 28, United States Code Annotated, Section 1254 (1) (62 Stat. 928), giving this Court jurisdiction in certiorari cases.

Questions Presented

Oscar Charles Peake, Jr., son of the petitioner here, was serving in the United States Army and he was granted a $10,000.00 policy of National Service Life Insurance and made his mother, the petitioner here, the beneficiary, and he served in the Army until on or about July 30, 1943, when he disappeared, without intelligence or tidings concerning him since. He was 18 years of age, devoted to his parents and to his younger sister and other relatives. He visited his home as often as he could and communicated with them regularly. He did not have the training or ability to make a living alone or apart from his near relatives. His personal habits were good and he was not dissolute or lacking in recognition of moral responsibility in any way. At the time of his disappearance he was a member of Company "B", 10th Infantry Training Batallion, Camp Wheeler, Georgia, and his organization on said date, or shortly thereafter, was enroute to San Francisco. The United States Army, ever since his disappearance, has made every effort to locate him or to have intelligence or tidings of him. The Federal Bureau of Investigation has also sought to locate

him or to receive intelligence of him. The last communication from him to his family was on or about July 30, 1943. The assured was suffering from cholera, nervous trouble, mental trouble, St. Vitus Dance, general disability, and weakness and despondency. He could not have lived for any length of time without assistance from his family or other relatives. The complaint charges that he died on or about July 30, 1943. The complaint also alleges that the facts and circumstances of his disappearance and death were such that in the case of Oscar C. Peak v. American National Life Insurance Company, No. 32168, in the Chancery Court of Hamilton County, Tennessee, on February 7, 1953, it was Ordered, Adjudged and Decreed by the court that the deceased was 18 years of age when he entered the military service of the United States; that he regularly communicated with his father and mother; that he returned to his home in Chattanooga to visit his parents when he was granted a leave of absence from military service, after which he returned to his post at Camp Wheeler, Georgia, and that the last communication or letter received by his parents or members of the insured's family was on or about July 30, 1943; that he disappeared from the military unit with which he was serving, and that diligent search and inquiry was made by the parents of the assured and members of his family, but that said search and inquiry disclosed no information or intelligence to account for his disappearance; and that the Federal Bureau of Investigation made diligent search and inquiry for the missing assured, but that its search and inquiry failed to disclose any information showing a reason for assured's disappearance or indicating his whereabouts, and that it appeared to the court that the insured had been absent and had not been heard from by those who ordinarily would have heard from him, for a period of more than seven years, and the court pre-

sumes and finds that the insured is dead; and under all the facts and circumstances disclosed by the evidence, finds and decrees that said insured died on or about July 30, 1943, the date of his mysterious and unexplained disappearance (Tr. 1-4).

Question 1. What does Section 810 of Title 38, U.S.C.A. mean, and does this statute repeal the English Common Law?

Question 2. Could the assured, in frail health and unable to make a living without assistance from his family, disappear under such circumstances that the law would presume from his disappearance, and no tidings of or from him for seven years, that he died or on about the date of his disappearance on July 30, 1943?

Question 3. Does Section 810 of Title 38, U.S.C.A. mean that in all suits on National Service Life Insurance, where the soldier disappeared, and no tidings of or from him for seven years, regardless of the circumstances of his disappearance, the law could not presume that he died immediately on his disappearance, and that in all cases the presumption would have to take effect seven years after the disappearance?

Question 4. Was petitioner's claim against the United States barred by the statue of limitations of six years, as held by the Circuit Court of Appeals, or did the statute of limitations begin to run only at the end of seven years, when the presumption of death became effective, in accordance with the English Common Law?

Statement of the Case

This is an ordinary suit, brought on a National Service Life Insurance policy. It was brought well within six years after the expiration of seven years from the disappearance of the soldier, on July 30, 1943. It was charged that he died

on or about the date of his disappearance, July 30, 1943. The District Court held that under no circumstances could Section 810 of Title 38, U.S.C.A., be construed to permit proof of death at or about the time of his disappearance, and that the policy had lapsed. The United States Circuit Court of Appeals construed the statute to mean that death could have resulted at an earlier date, provided, however, there was some showing that the deceased had encountered some specific peril or come within the range of some impending or imminent danger; and also held that plaintiff's claim was barred by the statute of limitations, and, as we understand, because suit was not brought within six years from the date of his disappearance on July 30, 1943.

Brief and Argument in Support of Appellant's Appeal

Section 810 of Title 38, U.S.C.A., reads as follows:

> "No State law providing for presumption of death shall be applicable to claims for National Service Life Insurance. If evidence satisfactory to the Administrator is produced establishing the fact of the continued and unexplained absence of any individual from his home and family for a period of seven years, during which period no evidence of his existence has been received, the death of such individual as of the date of the expiration of such period may, for the purposes of this subchapter, be considered as sufficiently proved."

This statute has not been construed, insofar as we have been able to find, except by the Trial Court and the Court of Appeals in this case, and by the Circuit Court of Appeals, 4th Circuit, in the recent case of *United States* v. *Willhite*, 219 Fed. (2d) 343. The Circuit Court of Appeals, 6th Circuit, in effect held that there could not be any finding by the jury that death occurred on or about the time the soldier

disappeared, unless it appeared that the deceased had encountered some specific peril or come within the range of some impending or imminent danger, which might reasonably be expected to destroy life, citing *Davie* v. *Briggs*, 97 U. S. 628, or the time may be shortened by proof of facts and circumstances connected with disappearance as would show death at an earlier date, citing *Fidelity Mutual Life Assurance Ass'n.* v. *Mettler*, 185 U. S. 308. This holding is in conflict and disagreement with the holding of the 4th Circuit, in *United States* v. *Willhite, supra*, where the facts were almost identical with those in the case at Bar, except that the deceased was not in bad health, only nervous. This latter holding was to the effect that the National Service Life Insurance Act section providing presumption of insured's death following seven years' continued and unexplained absence, does not preclude introduction of evidence in actions on claims where there is no direct proof as to insured's death, to rebut presumption and show true date of death to be earlier than the expiration of such period. The holding of the Circuit Court of Appeals in the case at Bar is also in conflict with the holding of the Circuit Court of Appeals, 5th Circuit, on the same subject matter, in the cases of *United States* v. *Hayman*, 62 Fed. (2d) 118, and *Mutual Life Ins. Co. of New York* v. *Hamilton*, 143 Fed. (2d) 726. In neither of these cases was there any showing that the assured had encountered some specific peril or come within the range of some impending or imminent danger which might reasonably be expected to destroy life. In *United States* v. *Hayman*, the facts were almost identical with those in the case at Bar. The case had been submitted to the jury and the jury found that the deceased had died on October 12, 1918, the date of his disappearance, and it was contended, as in *Davie* v. *Briggs, supra*, that proof was required of some specific peril; but Judge Hutcheson, now

the senior United States Circuit Court Judge, in writing the opinion of the court, said:

> "The Supreme Court of the United States has itself declined to accept as exclusive the rule of Davie v. Briggs, that proof must be made that at the time of the disappearance the person was subject to peril or danger. Fidelity Mutual Life Ins. Co. v. Mettler, 185 U. S. 308, 22 S. Ct. 662, 46 L. Ed. 922; cf. Wigmore Evid., Sec. 2531. In that case it was declared that the inference of death might arise from a disappearance inconsistent with the continuance of life, even though exposure to particular peril is not shown."

The court affirmed the judgment for the plaintiff on this War Risk Insurance policy.

In *Mutual Life Ins. Co. of New York* v. *Hamilton, supra,* the insured and deceased, Hamilton, was not subject to any peril or danger, and the case was submitted to the jury, and the jury found in favor of the plaintiff on the policies, that the deceased had died, but that death occurred while the policies were in force and effect, and not at the end of the seven year period after his disappearance. Judge Hutcheson was one of the Circuit judges considering that case. Near the end of the opinion of the court, affirming the judgment below in favor of the plaintiff, the court said:

> "The numerous questions propounded in this opinion, meanwhile probing the facts, add up to the conclusion that this case is pre-eminently one for the jury."

The Court further said:

> "Without doubt there is ample evidence to support the jury's finding that the presumption of death had been established. This having been done, it was neces-

sary in the present case that the time of death be fixed by the jury at some time within the seven-year period. The fact of death as established may be considered by the jury in fixing the time of death. 25 C.J.S., Death, Sec. 10, p. 1069. In addition to the letters, statements, and the other circumstances mentioned above from which an inference of Hamilton's death at or about the time of his disappearance may be drawn, the jury was entitled to take into consideration the fact that for many months he had been in such failing health as to be unable to work and earn a livelihood, that he had no funds of consequence on which to live, and there is no showing that the charity of his friends or the forbearance of his creditors was such that one in his state of health could long subsist, which fact would render it not improbable that had he remained alive he would have, as had been his custom for some time theretofore, called upon his family, especially his old mother, who had never failed him for support."

In *United States* v. *Willhite, supra,* George Skinner, the deceased, had, on March 13, 1944, applied for a National Service Life Insurance policy for $10,000.00, and designated his wife, Edna Mae Skinner (now Willhite) the appellee, as principal beneficiary, and the policy was duly issued, effective March 1, 1944, and, like Oscar Charles Peak, Jr., on March 24, 1944, his army unit was assigned to embark for an overseas destination, and the deceased, George Skinner, had been officially listed as absent without leave on the morning report. He was not subject to any peril or danger. He visited his family in North Carolina and was last seen by them on March 20, 1944, when he left his home on the morning of that day—presumably to return to Camp Patrick Henry, Virginia, but there was no evidence that he reported back to his army unit, and his family never heard

from him again. He had not said that he expected to commit suicide, but did say—not to his wife, but to his father and mother—that he would die before he would go overseas.

In *Davie* v. *Briggs*, Allen Jones Davie had left the State of North Carolina in 1851 to go overland to California, and was never heard from again after reaching the hostile Indian territory, and it was contended by complainants that he had died at the end of the seven-year period; but Mr. Justice Harlan, quoting from the Court of King's Bench in *Doe dem. Knight* v. *Napean* (5 Barn and Adol. 86), said:

> "Where a party has been absent seven years, without having been heard of, the only presumption arising is that he is then dead—there is none as to the time of his death."

Thereupon the Court said:

> "We therefore follow the established law when we inquire whether, according to the evidence, Allen Jones Davie died at an earlier date than at the end or expiration of the seven years, when the legal presumption of death arose. It seems to us that, upon the showing made by the complainants themselves, the conclusion is inevitable that he died some time during the year 1851."

This court, in *Fidelity Mutual Life Assur. Ass'n.* v. *Mettler, supra,* referring to *Davie* v. *Briggs, supra,* speaking through Mr. Chief Justice Fuller, said:

> "But it was not thereby ruled that the inference of death might not arise from disappearance under circumstances inconsistent with a continuation of life, even though exposure to some particular peril was not shown, and the evidence indicated that Hunter came within the range of immediate danger."

In the above case the deceased disappeared December 4, 1896, and suit was brought on December 2, 1897, and the case was decided by the United States Supreme Court on May 5, 1902, and the question of presumption of death at the end of seven years was not involved, but the court found that his death was proved as of December 4, 1896.

This is an important question of Federal law, which has not been, but should be finally settled by this court, and, we believe, in accordance with the holdings of the 4th and 5th Circuits.

The effect of the holding of the Circuit Court of Appeals, Sixth Circuit, in the case at Bar, is that petitioner's suit is barred by the statute of limitations and is in conflict, on the same subject matter, with the holdings of the Circuit Court of Appeals, Fifth Circuit, in *United States* v. *Hayman*, 62 Fed. (2d) 118, and in *Mutual Life Ins. Co. of New York* v. *Hamilton*, 143 Fed. (2d) 726, and with the Fourth Circuit Court of Appeals in the case of *United States* v. *Willhite*, 219 Fed. (2d) 343, both Circuits holding, in effect, that the statute of limitations does not being to run until the end of the seven-year period of disappearance, and that the court had jurisdiction to try the cause, and it was a matter for the jury to decide as to the time that death occurred, and not a question for the court to decide as a matter of law, as did the Sixth Circuit in the case at Bar.

We think the question of the statute of limitations is controlled by the three cases cited above.

Another case to the same effect is *Howard* v. *United States*, 28 Fed. Supp. 985. This case quotes at length from *United States* v. *Hayman*, *supra*, and from other cases cited, and then the court says:

> "The Government asserts that to apply this principle here would be to change the condition which the

sovereign has imposed upon the right to be sued—namely, the institution of the suit within six years.

"Death, if it actually occurs, causes the right of action to accrue. But, where reliance is placed not upon acual death, but upon the presumption arising from unexplained absence for a period of seven years, the right to sue does not come into being until after the expiration of the period.

"Only after the period has run fully, can *the fact of death be proved.*

"In using the presumption to suspend the running of the statute, we are not extending the period during which the consent of the sovereign is effective. Absent direct proof of *the fact of death*, which inaugurates the limitation period, the *presumption* which the seven-year period supplies as proof of the fact is used instead. So that all we do is to give effect to a presumption without which there *could be no* proof of death.

"As the Government's duty to pay stems from the fact of death, the Government is not harmed when absent direct proof of that fact, the legal presumption from absence is used as an aid or a substitute. For, if suit were instituted before the expiration of the seven-year period, and the assured, like Enoch Arden, later returned, the Government might be confronted by conflicting claims or find that it had paid in full a policy upon the life of a person who is still living and who would, ordinarily, still be obligated to the continued payment of the premiums.

"If the beneficiary waits the full seven years, he or she is playing fair with the Government. For, by resorting to the aid of the presumption in proof of death, any future claim that death, *as a fact*, actually *did not* exist in the case is forestalled.

"A policy of liberalism permeates the entire structure of war risk insurance."

In *New York Life Ins. Co.* v. *Nashville Trust Co.*, 159 S. W. (2d) 81, the contention was made by the defendant that the statute of limitations had run. The Tennessee Supreme Court quoted from Corpus Juris, as follows:

> "Although there is authority to a different effect, the great weight of authority supports the view that where the fact of death can only be determined through the aid of the statutory presumption of death from seven years' unexplained absence, the beneficiary's cause of action does not accrue until the expiration of the seven-year period following the disappearance of the insured, and the statute of limitation does not begin to run until that time."

The Tennessee Supreme Court went on to say:

> "Numerous decisions supporting the text just quoted are cited thereunder and see also Notes, 34 A.L.R. 91; 61 A.L.R. 686; 119 A.L.R. 1308; L.R.A. 19188, 95."

The question of the statute of limitations is an important question of Federal law, which has not, but should be settled by this Court, and, we believe, in accordance with the foregoing cases.

We also respectfully insist that the District Court has so far departed from the usual course of judicial decision on the question of the statute of limitations, and against the Fourth and Fifth Circuit, and this departure has been sanctioned by the Circuit Court of Appeals in the case at Bar, and that this calls for an exercise of this Court's power of supervision, and that this Court should, and will, hold that the conclusions of the Fourth and Fifth Circuits, above

sought, are humane and in accordance with the purpose of the Congress in passing the National Service Life Insurance Act.

Section 810 of Title 38, U.S.C.A., has not been, but should be construed by this Court. The first sentence:

> "No state law providing for presumption of death shall be applicable to claims for National Service Life Insurance,"

clearly shows, we think, that the intent of Congress was to make a uniform system for National Service Life Insurance. The next sentence clearly does not attempt to repeal the English Common Law, as it has been adopted by our American Courts, including this Court, but merely gives the Administrator of Veterans Affairs permission to find and hold that the unexplained absence of any individual from his home and family for a period of seven years, during which time no evidence of his existence has been received, presumes death at the end of that period.

We think the case of Oscar Charles Peak, Jr. *v.* United States; *United States* v. *Hayman, supra,* and *United States* v. *Willhite, supra,* are so identical in their facts that it becomes a part of the National welfare for this Court to carefully supervise the lower Federal courts in administering the National Service Life Insurance Act, so there will not be any discrimination as to the treatment of the beneficiaries of soldiers of the United States, and that this Court should, and will, consider the case at Bar and reverse the Circuit Court of Appeals, Sixth Circuit, and order that court to remand the cause to the District Court for trial.

Conclusion

WHEREFORE, for the reasons set forth above, it is respectfully submitted that this Court should reverse the opinion and judgment of the Circuit Court of Appeals and

order that Court to reverse the District Court, and remand the cause to the District Court, with directions to reinstate the cause upon the docket and let the defendant answer, and the cause tried to a jury, upon the merits, as sought in the original complaint.

Respectfully submitted,

JOHN S. WRINKLE,
1521 Hamilton National Bank Bldg.,
Chattanooga, Tennessee,
Counsel for Petitioner.

(2588-2)

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Summary of argument	4
Argument	8
I. The District Court was without jurisdiction over petitioner's claim since it was barred by limitations	10
A. Petitioner's cause of action accrued on the date of the insured's alleged death and suit had to be instituted within six years thereafter	10
B. The unexplained absence of the insured for seven years could not extend the time allowed by Congress to bring suit	13
II. The facts alleged in petitioner's complaint are insufficient to permit a finding that the insured died before the policy lapsed	26
A. Under the National Service Life Insurance Act, the insured is presumed to have died at the expiration of the seven year period following his disappearance and not before	26
B. The specific facts alleged do not permit an inference that the insured died at the time of his disappearance, rather than at some later point	28
Conclusion	37
Appendix	38

CITATIONS

Cases: Page

Amy v. *Watertown*, 130 U. S. 320 17
Ball v. *United States*, 101 F. 2d 272, certiorari denied, 308 U. S. 563 13
Baltimore and Phila. Steamboat Co. v. *Norton*, 284 U. S. 408 19
Bono v. *United States*, 113 F. 2d 724 12
Brownlee v. *Mutual Ben. Health & Accident Ass'n*, 29 F. 2d 71 31
Cable v. *United States*, 104 F. 2d 541 12
Chicago and N. W. Ry. Co., In re, 138 F. 2d 753, certiorari denied *sub nom. Roth* v. *Carlson*, 321 U. S. 789 28
Cole v. *United States*, 112 F. 2d 203, certiorari denied, 311 U. S. 647 12
Dalehite v. *United States*, 346 U. S. 15 ..... 10, 11
Davie v. *Briggs*, 97 U. S. 628 ..... 26, 27, 29, 32, 33
Domena v. *United States*, 149 F. 2d 810 12
English v. *United States*, 25 F. 2d 335 ..... 28, 34–36
Far East Conference v. *United States*, 342 U. S. 570 21
Feres v. *United States*, 340 U. S. 135 10
Fidelity Mutual Life Ass'n. v. *Mettler*, 185 U. S. 308 ..... 29, 30
Howard v. *United States*, 28 F. Supp. 985, appeal dismissed, 119 F. 2d 1023 ..... 13, 14, 19, 22
Jones v. *Metropolitan Life Ins. Co.*, 116 F. 2d 555 27
Klamath and Moadoc Tribes v. *United States*, 296 U. S. 244 ..... 10, 11
Lynch v. *United States*, 292 U. S. 571 10
McCune v. *United States*, 56 F. 2d 572 ..... 26, 36
McIver v. *Regan*, 2 Wheat. 25 ..... 16, 17
McMahon v. *United States*, 342 U. S. 25 ..... 19, 21
McNulty v. *General American Life Ins. Co.*, 153 Pa. Super. 288, 33 A. 2d 796 34
Mattison-Greenlee Service Corp. v. *Culhane*, 103 F. 2d 608 17
Moore v. *Braniff Airways*, 54 F. Supp. 422, affirmed, *Battles* v. *Braniff Airways*, 146 F. 2d 336, certiorari denied, 325 U. S. 871 17
Morgan v. *United States*, 115 F. 2d 427 12
Munro v. *United States*, 303 U. S. 36 ..... 10, 23
Mutual Ben. Life Ins. Co. v. *Tisdale*, 91 U. S. 238 37

Cases—Continued

	Page
Mutual Life Ins. Co. of N. Y. v. *Hamilton*, 143 F. 2d 726, certiorari denied, 323 U. S. 760	14, 26
Neely v. *United States*, 115 F. 2d 448	13
New York Life Ins. Co. v. *Gamer*, 303 U. S. 161	28
Occidental Life Ins. Co. v. *Thomas*, 107 F. 2d 876	30, 31
Penn Mutual Life Ins. Co. v. *Tilton*, 84 F. 2d 10	30
Pettibone v. *Cook County, Minn.*, 120 F. 2d 850	17
Pickett v. *Aglinsky*, 110 F. 2d 628	17
Pillsbury v. *United Engineering Co.*, 342 U. S. 197	7, 19, 20, 24
Pollen v. *Ford Instrument Co.*, 108 F. 2d 762	17
Poole v. *Terminix Co. of Md. & Wash.*, 200 F. 2d 746	16
Riddlesbarger v. *Hartford Ins. Co.*, 7 Wall. 386	25
Riley v. *United States*, 212 F. 2d 692	15–16
Roskos v. *United States*, 130 F. 2d 751, certiorari denied, 317 U. S. 696	12
Simmons v. *United States*, 110 F. 2d 296	12
Sullivan v. *United States*, 116 F. 2d 576	12
Thetford v. *Modern Woodmen of America*, 273 S. W. 666	34
Thurston v. *United States*, 179 F. 2d 514	22
Unexcelled Chemical Corp. v. *United States*, 345 U. S. 59	19, 20, 21
United States v. *Chavez*, 87 F. 2d 16	12
United States v. *Hayman*, 62 F. 2d 118	14, 32
United States v. *Lindsay*, 346 U. S. 568	19, 22
United States v. *Meakins*, 96 F. 2d 751	12
United States v. *O'Brien*, 51 F. 2d 37	28
United States v. *Oregon Lumber Co.*, 260 U. S. 290	25
United States v. *Robertson*, 44 F. 2d 317	36
United States v. *Sherwood*, 312 U. S. 584	10, 11
United States v. *Siegel*, 225 F. 2d 869	16
United States v. *Towery*, 306 U. S. 324	5, 12
United States v. *Willhite*, 219 F. 2d 343	6, 13, 14, 15, 19, 22, 23, 32
Voris v. *Eikel*, 346 U. S. 328	19
Westphal v. *Kansas City Life Ins. Co.*, 126 F. 2d 70, certiorari denied, 316 U. S. 705	27
Wood v. *Carpenter*, 101 U. S. 135	17

Statutes: Page

Act of January 28, 1935, 49 Stat. 1, 38 U. S. C. 445c 24
Act of June 29, 1936, 49 Stat. 2034, 38 U. S. C. 445d 24
Act of June 5, 1942, c. 351, 56 Stat. 325, 38 U. S. C. 32a 27
Bacon-Davis Act, 40 U. S. C. 276a *et seq* 20
Clarification Act, § 1 (a), 50 U. S. C. App. 1291 (a) 21
Commodity Credit Corporation Charter Act of June 29, 1948, as amended, § 4b (c), 15 U. S. C. 714b (c) 22
Fair Labor Standards Act of 1938, as amended, 29 U. S. C. 201, *et seq* 20
Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. 901 *et seq*:
Sec. 6 (a) (33 U. S. C. 906 (a)) 20
Sec. 13 (a) (33 U. S. C. 913 (a)) 19
National Service Life Insurance Act of 1940, 54 Stat. 1008, as amended, 38 U. S. C. 801 *et seq.*:
Sec. 602 (n) (38 U. S. C. 802 (n)) 9, 38
Sec. 610 (38 U. S. C. 810) 6, 7, 9, 14, 27, 34, 37, 39
Sec. 617 (38 U. S. C. 817) 11, 39
Portal to Portal Act of 1947, § 6, 29 U. S. C. 255 20
Suits in Admiralty Act, 46 U. S. C. 745 21
Walsh-Healey Act, 41 U. S. C. 35 *et seq* 20
War Risk Insurance Act of 1917, 40 Stat. 398, 409:
Sec. 400 12
Sec. 401 12
World War Veterans Act, 1924, 43 Stat. 612, as amended, § 19 (38 U. S. C. 445). 5, 6, 10, 11, 12, 16, 23, 24, 39

Miscellaneous:
38 C. F. R. 8.7 9
18 Encyclopedia Americana (1944 ed.), p. 88 33
Manual for Courts-Martial, 1928:
Article of War 39 34
Article of War 58 34

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 491

LEONA PEAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Eastern District of Tennessee, Southern Division (R. 5–6), is not reported. The opinion of the United States Court of Appeals for the Sixth Circuit (R. 7–9) is reported at 229 F. 2d 503.

JURISDICTION

The judgment of the Court of Appeals was entered on February 14, 1956 (R. 7). A timely petition for rehearing was denied on March 12, 1956 (R. 9). The petition for a writ of certiorari was filed on May 12, 1956, and was granted on October 8, 1956 (R. 10). 352 U. S. 822. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner's action is barred by limitations.

2. Whether, assuming that the action is not barred, the facts alleged in petitioner's complaint are sufficient to submit to a jury the question whether the insured died prior to the lapse of his National Service Life Insurance policy for non-payment of premiums.

STATUTES INVOLVED

The relevant provisions of the National Service Life Insurance Act of 1940, as amended, and of the World War Veterans' Act, 1924, as amended, are set forth in the Appendix, *infra*, pp. 38–40.

STATEMENT

This action was brought by petitioner against the United States to recover the proceeds of a $10,000 National Service Life Insurance policy issued to her son, Oscar Charles Peak, Jr. Both courts below held that petitioner's complaint failed to state a claim upon which relief could be granted. Additionally, the Court of Appeals determined that the action was time-barred. The allegations of the complaint, and the proceedings below, may be summarized as follows:

1. *Allegations of fact in the complaint.*—On April 29, 1943, Oscar Charles Peak, Jr., then eighteen years of age, was inducted into the military service (R. 1). Effective May 1, 1943, he was issued a National Service Life Insurance policy in the amount of $10,000 (R. 2). His mother, petitioner herein, was named as principal beneficiary (R. 2).

On or about July 30, 1943, the insured disappeared from the infantry training battalion at Camp Wheeler, Georgia, to which he was assigned (R. 1). On that date, or shortly thereafter, the battalion was transferred to San Francisco (R. 1). Since the insured's disappearance, the Army, the Federal Bureau of Investigation, and members of his family have endeavored, without success, to ascertain his whereabouts (R. 1).

The complaint also alleged that, prior to his disappearance, the insured was devoted to his parents and other relatives (R. 1). He visited home as frequently as possible and communicated with his relatives regularly (R. 1). He did not have the training or ability to make a living apart from his family (R. 1). His personal habits were good and he was not lacking in moral responsibility (R. 1).

On February 7, 1953, in connection with a suit involving a commercial insurance policy possessed by the insured, a state chancery court ruled, on the basis of his unexplained absence for more than seven years, that the insured was to be presumed dead (R. 2). The state court fixed the date of death as July 30, 1943, the day that the insured disappeared (R. 2).

The complaint states further that at the time the National Service Life Insurance policy was issued, and at all times up until his death, the insured was suffering from "cholera, nervous trouble, mental trouble, St. Vitus Dance, general debility and weakness and despondency" and was permanently and totally disabled (R. 3). For this reason, it is alleged, the insured was entitled to a waiver of premiums and

his policy remained in full force and effect until his death, which is presumed to have occurred on or about July 30, 1943 (R. 3).

After the expiration of the seven year period following the insured's disappearance, petitioner applied to the Veterans Administration for the proceeds of the policy (R. 3). On July 18, 1951, the Veterans Administration denied the claim (R. 3).

2. *Proceedings in the courts below.*—On February 19, 1954, petitioner filed her complaint (R. 1). On July 20, 1954, the United States filed a motion to dismiss on the grounds (1) that the court lacked jurisdiction over the subject matter, and (2) that the complaint failed to state a cause of action (R. 4). On February 15, 1955, the District Court granted the motion on the second ground and dismissed the action (R. 7).[1]

The Court of Appeals affirmed (R. 7). Agreeing with the District Court that the complaint failed to state a cause of action, the Court of Appeals also determined that the action was barred by limitations (R. 7–9).

SUMMARY OF ARGUMENT

By this action brought in 1954, petitioner, as beneficiary, seeks to recover the proceeds of a National Service Life Insurance policy held by a serviceman who disappeared from his military unit in the summer of 1943. No premiums were paid thereafter, either by the insured or by the beneficiary (or other person)

[1] The statement in the Court of Appeals' opinion (R. 8) that the District Court dismissed the action on both of the grounds advanced in the motion is incorrect.

on his behalf. The asserted basis for recovery accordingly is that the insured died on or about the date of his disappearance, *i. e.*, before the policy lapsed for non-payment of premiums. In affirming the dismissal of petitioner's complaint, the court of appeals held that the action was barred by limitations and that, in any event, the complaint failed to state a claim upon which relief could be granted. We submit that both of these alternative holdings are correct.

I

A. The jurisdiction of district courts over actions brought on National Service Life Insurance policies is subject to the provisions of 38 U. S. C. 445 (Appendix, *infra*, pp. 39–40) which requires (with exceptions not pertinent here) that suit must be brought within six years "after the right accrued for which the claim is made." The statute defines the accrual of the right in terms of "the happening of the contingency on which the claim is founded." Applying this Court's holding in *United States* v. *Towery*, 306 U. S. 324, the "contingency" upon which petitioner's claim is founded is the alleged death of the insured on or about the date of his disappearance (*i. e.*, while the insurance was still in effect on a premium-paying basis). Since suit was not instituted until approximately eleven years thereafter, the district court was plainly without jurisdiction.

B. Notwithstanding 38 U. S. C. 445 and the *Towery* decision, petitioner argues that her cause of action did not accrue until 1950, seven years after the insured allegedly died. While this argument finds

support in a decision of the Fourth Circuit (*United States* v. *Willhite*, 219 F. 2d 343), we believe that it is not tenable.

In the first place, petitioner's reliance must be upon actual, rather than presumed, death. Congress has expressly provided that, for the purposes of National Service Life Insurance claims, the presumption created by seven years' absence is that the insured died *at the expiration of the period.* 38 U. S. C. 810, Appendix, *infra*, p. 39. As petitioner herself recognizes in alleging that the insured died at the inception of the absence, to presume that the death of this insured occurred at the end of the seven years would not assist her since the insurance was not then in effect.

Secondly, the presumption in no event serves as more than an aid in making out a *prima facie* case. Petitioner was entitled at all times after the insured disappeared to bring suit and, upon proof that the disappearance was the result of death, to recover the proceeds of the policy. (Alternatively, she could have kept the policy alive with a view to invoking the presumption in the event the insured failed to reappear.) 38 U. S. C. 445 does not provide for the suspension of the accrual of the cause of action or for the tolling of limitations during such interval as a claimant may be seeking supporting proofs. Nor could such a result be obtained under long-settled principles relating to statutes of limitations generally. It is universally accepted that, absent concealment, fraud, or duress on the part of the defendant, difficulties of proof will not justify the courts in writing an excep-

tion into a statute of limitations. Indeed, as *Pillsbury* v. *United Engineering Company*, 342 U. S. 197, and other recent decisions of this Court show, a statute of limitations must be applied as written even if the practical effect in a particular case may be to reduce substantially or to eliminate the period during which suit may be brought on a cause of action. As this Court has held, the remedy in such cases must be provided by Congress.

II

Apart from the jurisdictional bar to this action, petitioner's complaint was properly dismissed. As both courts below held, the alleged facts with respect to the circumstances surrounding the insured's disappearance in July 1943 are insufficient on their face to support an inference that he died on or about the date of that disappearance.

A. At common law, the continuous and unexplained absence of an insured for a period of seven years gave rise to a presumption of the fact of death; it did not, however, fix the time of death. Consequently, even if the common law rules were applicable here, petitioner could not rest upon the common law presumption alone.

Contrary to petitioner's position, however, the common law presumption is not applicable to National Service Life Insurance claims. By the express and unequivocal terms of 38 U. S. C. 810, the death of of the insured serviceman is presumed as of the date of the *expiration* of the seven-year period. Since, in order to recover, petitioner must demonstrate that the

insured died at the inception of the absence, the statute is an obstacle, rather than an aid, to her case, and she must overcome the presumption that life continued during the seven years by introducing substantial evidence to the contrary.

B. Even at common law, the inference that death occurred at the inception of the absence could be drawn by the trier of fact only if (1) the absentee, at that time, encountered some specific peril or came within the range of some imminent danger which might reasonably be expected to destroy life; or (2) there were other established facts inconsistent with a continuation of life. The alleged facts in this case satisfy neither test. There is no averment in the complaint disclosing that the insured, when last seen, was confronted with a specific and immediate peril; and the purported circumstances surrounding the insured's disappearance leave no basis for selecting death as a more reasonable explanation of the disappearance than a variety of other possible explanations, including desertion from the armed forces in the face of transfer to the Pacific theatre. Were petitioner to establish all of the material allegations of fact in the complaint, a finding that the insured's disappearance was occasioned by death would be based upon sheer speculation.

ARGUMENT

Petitioner must admit that unless the insured died on or about July 30, 1943 (the date of his disappearance), his National Service Life Insurance policy lapsed for non-payment of premiums. This results

from the failure of the complaint to allege that premiums were paid on the policy at any date subsequent thereto.

But while petitioner alleges that death actually occurred in 1943, when the policy was still in effect, she also seeks, inconsistently, to make use of the statutory presumption (the provision of Section 610, *infra*, p. 39, that death may be presumed to have taken place as of the date of the *expiration* of a continued and unexplained seven year period of absence) in an effort to avoid application of the six year period of limitations.

It should be noted at once that this dilemma is self-created by the petitioner and does not rise from the terms of the statute. The choice given by Congress was ample and fair. Assuming petitioner to possess proof sufficient to show the death of the insured at the time of his disappearance in 1943, suit could have been maintained at any time within six years thereafter. Assuming, on the contrary, that petitioner lacked such proof, she had merely to keep the policy in force by payment of premiums[2] or application for waiver[3] to take advantage of the presumption granted by the Congress in Section 610.

---

[2] The Veterans Administration has advised us that it has been its regular practice in the administration of the National Service Life Insurance Act to accept, on behalf of the insured, premium payments from any source. This practice is presently reflected in 38 C. F. R. 8.7, relating to the payment of premiums during the grace period.

[3] By claiming a date of death three months after the issuance of the policy, petitioner has obviated any suggestion of a right to claim waiver of premiums, since the minimal requirement for waiver under Section 602 (n) of the Act (*infra*, pp. 38–39) is six

We shall argue below (Point I) that petitioner's suit, on the facts stated in her complaint, was untimely since it was brought more than six years after the alleged date of petitioner's death. We shall also urge (Point II) that, limitations provisions apart, the allegations of the complaint are insufficient on their face to permit a jury to infer that petitioner died at or about the time of his disappearance. Either contention, if valid, is dispositive.

I. THE DISTRICT COURT WAS WITHOUT JURISDICTION OVER PETITIONER'S CLAIM SINCE IT WAS BARRED BY LIMITATIONS

A. PETITIONER'S CAUSE OF ACTION ACCRUED ON THE DATE OF THE INSURED'S ALLEGED DEATH AND SUIT HAD TO BE INSTITUTED WITHIN SIX YEARS THEREAFTER

"[N]o action lies against the United States unless the legislature has authorized it." *Dalehite* v. *United States*, 346 U. S. 15, 30; *Feres* v. *United States*, 340 U. S. 135, 139; *United States* v. *Sherwood*, 312 U. S. 584, 587, 590; *Munro* v. *United States*, 303 U. S. 36, 41; *Lynch* v. *United States*, 292 U. S. 571, 581–582; *Klamath and Modoc Tribes* v. *United States*, 296 U. S. 244, 250.[4] In determining whether there has been

---

months total disability commencing during the life of t policy. Moreover, it is not alleged that there was any application for a waiver. The District Court held the waiver section of the Act was inapplicable to the facts of this case, a position apparently accepted by petitioner as the point is not referred to in her brief despite the general disability language in the complaint (*supra*, p. 3).

[4] Both *Munro* and *Lynch* involved statutory provisions authorizing suit against the United States on insurance claims; indeed the former concerned, as does this case (see p. 11, *infra*), the limitations provisions of Section 19 of the World War Veterans' Act of 1924, as amended.

such authorization, a "clear relinquishment of sovereign immunity" is required. *Dalehite* v. *United States, supra,* at 31; *United States* v. *Sherwood, supra,* at 590. A statute waiving the Government's immunity from suit "may not by implication be extended to cases not plainly within its terms." *Klamath and Moadoc Tribes* v. *United States, supra,* at 250.

The jurisdiction of the district courts over suits like that here involved is derived exclusively from Section 617 of the National Service Life Insurance Act of 1940, as amended, 38 U. S. C. 817, which provides (as it appears in the United States Code):

> In the event of disagreement as to any claim arising under this subchapter, suit may be brought in the same manner and subject to the same conditions and limitations as are applicable to United States Government life (converted) insurance under the provisions of sections 445 and 551 of this title.

Section 19 of the World War Veterans' Act, 1924, as amended, 38 U. S. C. 445, in turn provides in material part that:

> * * * no suit on United States Government life (converted) insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made: *Provided,* That for the purposes of this section it shall be deemed that the right accrued *on the happening of the contingency on which the claim is founded:* * * * [Emphasis added].

The "contingency" upon which petitioner's claim is founded is the alleged death of the insured on or

about July 30, 1943 (*i. e.*, while the insurance was still in effect on a premium-paying basis). It is solely the occurrence of such event which could give rise to a right in petitioner to recover the proceeds of the policy. As held in *United States* v. *Towery*, 306 U. S. 324, "contingency" can mean only the death (or the total and permanent disability[5]) of the insured during the period the insurance was in force.[6] That specific holding accords with earlier determinations of several courts of appeals and has been consistently followed. See *e. g. Cole* v. *United States*, 112 F. 2d 203 (C. A. D. C.), certiorari denied, 311 U. S. 647; *Domena* v. *United States*, 149 F. 2d 810 (C. A. 1); *Fino* v. *United States*, 113 F. 2d 724 (C. A. 2); *Roskos* v. *United States*, 130 F. 2d 751 (C. A. 3), certiorari denied, 317 U. S. 696; *Simmons* v. *United States*, 110 F. 2d 296 (C. A. 4); *Morgan* v. *United States*, 115 F. 2d 427 (C. A. 5); *Sullivan* v. *United States*, 116 F. 2d 576 (C. A. 6); *Cable* v. *United States*, 104 F. 2d 541 (C. A. 7); *United States* v. *Meaking*, 96 F. 2d 751 (C. A. 9); *United States* v. *Chavez*, 87 F. 2d 16 (C. A. 10).

Under the terms of 38 U. S. C. 445, and its uniform judicial construction, the District Court was without

---

[5] The *Towery* case involved World War I war risk term insurance. Unlike term National Service Life Insurance, World War I insurance matured upon either death or total and permanent disability. See Sections 400 and 401 of the War Risk Insurance Act of 1917, 40 Stat. 398, 409.

[6] The Court stated (306 U. S. at 331): "A reading of the section as a whole is persuasive that what Congress intended by 'the contingency upon which the claim is founded' was the contingency on which liability under the policy was bottomed, namely—permanent disability or death * * *."

jurisdiction over petitioner's claim. The six year period from the date that the insured allegedly died expired on or about July 30, 1949, several years before suit was instituted. The fact that petitioner, subsequent to that date, filed a claim with the Veterans Administration, and that the claim was administratively considered and rejected, could not operate to raise the fallen bar of the statute of limitations.[1] See *Ball* v. *United States*, 101 F. 2d 272, 274 (C. A. 6), certiorari denied, 308 U. S. 563; *Neely* v. *United States*, 115 F. 2d 448 (C. A. 4) and cases there cited. As the Sixth Circuit held in the *Ball* case (101 F. 2d at 274), "The statute of limitations applies not to administrative consideration of claims, but only to the bringing of suit thereon."

B. THE UNEXPLAINED ABSENCE OF THE INSURED FOR SEVEN YEARS COULD NOT EXTEND THE TIME ALLOWED BY CONGRESS TO BRING SUIT

Notwithstanding 38 U. S. C. 445 and the *Towery* decision, petitioner argues that her cause of action did not accrue until July 30, 1950—*i. e.*, seven years after the insured allegedly died. In this connection, she relies principally on *United States* v. *Willhite*, 219 F. 2d 343 (C. A. 4) and *Howard* v. *United States*, 28 F. Supp. 985 (W. D. Wash.), appeal dismissed, 119 F. 2d 1023 (C. A. 9). In *Howard*, which involved World War I risk insurance, it was held that, where reliance is placed not upon actual death but upon

[1] While the complaint does not specify the date upon which petitioner's claim was filed with the Veterans Administration, it does appear therein that it was at least seven years after the insured disappeared and allegedly died.

the presumption arising from an unexplained absence for a period of seven years, the right to sue does not come into being (*i. e.*, the cause of action does not accrue) until the expiration of the seven year period. In *Willhite*, the Fourth Circuit, by a divided vote, followed this holding with respect to a claim for National Service Life Insurance.[8]

We submit that, even apart from the requirement of strict adherence to the statutory terms (see p. 11, *supra*), the reasoning of the *Howard* court will not stand analysis—at least as applied to suits on National Service Life Insurance. In our view, the majority of the Fourth Circuit, which expressly recognized the logic of *Howard* to be doubtful (219 F. 2d at 350), erred in following it in *Willhite*.

1. Whatever may have been the situation in *Howard*, there can be no question that petitioner's reliance here must be upon *actual* death rather than presumed death. Congress has expressly and unequivocally provided in Section 610 of the National Service Life Insurance Act (38 U. S. C. 810, *infra*, p. 39) that, for the purposes of claims arising under that Act, the presumption created by seven years unexplained absence is that the insured died *at the end of the period*. But to presume that the insured's death occurred on or about July 30, 1950, cannot aid petitioner since the

[8] Petitioner also cites (Br. p. 10) *United States* v. *Hayman*, 62 F. 2d 118 (C. A. 5) and *Mutual Life Ins. Co. of N. Y.* v. *Hamilton*, 143 F. 2d 726 (C. A. 5), certiorari denied, 323 U. S. 760. Insofar as the *Hayman* opinion shows, however, the limitations question was neither raised nor considered. The *Hamilton* case did not involve Government insurance. Cf. pp. 22–23, *infra*.

policy was not in effect on that date (see pp. 8–9, *supra*). We emphasize again that what petitioner must (and does) assert as a basis for recovery is that—notwithstanding the presumption that death occurred at the end of the period—the insured in actuality died on or about July 30, 1943, *i. e.*, before the policy lapsed for nonpayment of premiums.

In other words, the presumption created by Congress may provide aid to a beneficiary who sues on a policy which has remained viable during the period of an insured's disappearance (whether the policy has been maintained in paid-up status as a result of continuing payments by the beneficiary or other person, or as a result of an effective waiver of premiums). It cannot aid one whose suit rests on the premise that death actually occurred seven years prior to the date which would be adopted if the presumption were indulged and given effect.

2. It should also be emphasized that the presumption in no case serves as anything more than an aid in making out a *prima facie* case; and that petitioner was entitled at all times after the insured disappeared to bring her action and, upon proof that disappearance was the result of death, to recover the proceeds of the policy.[9] As the Fourth Circuit itself recognized less than a year before *Willhite*,[10] the limitations

---

[9] It may be noted that the same alleged facts that petitioner seeks to rely on here, *e. g.*, the illness of the insured and his close relation to his family, were just as readily available to her during the six years following the insured's disappearance.

[10] In *Riley* v. *United States*, 212 F. 2d 692, the beneficiary was first notified by the War Department of the insured's death in combat almost a year after it had taken place. Suit on the insurance policy was brought within six years from the

section—38 U. S. C. 445—does not provide either for the suspension of the accrual of the cause of action or for the tolling of limitations during such interval as the plaintiff may be doubtful as to whether she can substantiate her claim. Cf. *United States* v. *Siegel*, 225 F. 2d 869 (C. A. 9). Nor could such a result be obtained under long-settled principles relating to statutes of limitations. Even as to ordinary limitations provisions, it is universally accepted that, absent concealment, fraud or duress on the part of the defendant, the limitations period commences to run at the time the cause of action accrues, irrespective of whether the plaintiff is then in a position to supply the requisite proof. See, *e. g.*, *McIlver* v. *Regan*, 2 Wheat. 25; *Poole* v. *Terminix Co. of Md. & Wash.*, 200 F. 2d 746

---

date of notification, but more than six years from the date of death. Holding the action time-barred, the Fourth Circuit observed that (212 F. 2d at 695):

> Under the precise terms of [38 U. S. C. 445] "the right accrued on the happening of the contingency on which the claim is founded". Clearly, this would seem to contemplate only one contingency, which must be the death of [the insured]. The statute makes no reference to notification of such death by the Government. Certainly, in the absence of any such notification, which forms no basis for the claim or cause of action, a beneficiary who could clearly prove insured's death, would have a valid claim.
>
> Again, it is the general rule that Statutes of Limitation begin to run upon the happening of the event which gives rise to the claim or cause of action, and not from the time when the claimant receives notice of the happening of this event. Further, the Statute here gives a right which did not exist at common law—here the waiver of the sovereign's immunity from suit at the hands of a private individual. It is quite generally held, in such instances, that courts must respect any conditions, restrictions and limitations which the Statute prescribes in plain language.

(C. A. D. C.); *Mattison-Greenlee Service Corp.* v. *Culhane,* 103 F. 2d 608 (C. A. 7); *Pettibone* v. *Cook County, Minn.,* 120 F. 2d 850 (C. A. 8); *Pickett* v. *Aglinsky,* 110 F. 2d 628 (C. A. 4); *Moore* v. *Braniff Airways,* 54 F. Supp. 422 (N. D. Tex.), affirmed, *Battles* v. *Braniff Airways,* 146 F. 2d 336 (C. A. 5), certiorari denied, 325 U. S. 871; and cases discussed pp. 18–21, *infra.* Cf. *Amy* v. *Watertown,* 130 U. S. 320, 323–324; *Wood* v. *Carpenter,* 101 U. S. 135, 142. And in the case of limitations provisions in statutes (such as the Act here involved), which create a liability and a right of action where none existed before, it is familiar doctrine that no exceptions of any kind are to be implied. See *e. g., Pollen* v. *Ford Instrument Co.,* 108 F. 2d 762 (C. A. 2), and cases there cited.

The *McIver* case, *supra,* aptly illustrates the proposition that difficulties of proof will not justify the courts in implying an exception to a statute of limitations. Plaintiffs there sued in ejectment, and defendants pleaded, as a bar, possession for seven years. No corner of the grant under which plaintiffs claimed was marked except the beginning corner, and that corner, and all others but one, were within the Indian boundary. Since the laws of the United States prohibited all persons from surveying Indian lands, plaintiffs were unable to survey their land and prove defendants within their grant until the Indian lands were ceded to the United States. Nevertheless, Chief Justice Marshall refused to except plaintiffs from the operation of the statute of limitations, reasoning as follows (2 Wheat. at 29–30):

Wherever the situation of a party was such as, in the opinion of the legislature, to furnish a motive for excepting him from the operation of the law, the legislature has made the exception. *It would be going far, for this court to add to those exceptions. It is admitted, that the case of the plaintiffs is not within them, but it is contended to be within the same equity with those which have been taken out of the statute; as where the courts of a country are closed, so that no suits can be instituted. This proposition cannot be admitted. The difficulties under which the plaintiffs labored, respected the trial, not the institution of their suit.* There was no obstruction to the bringing of this ejectment at an earlier date. If, at the trial, a survey had been found indispensable to the justice of the cause, the sound discretion of the court would have been exercised, on a motion for a continuance. Had such a motion been overruled, the plaintiffs would have been in the condition of all those who, from causes which they cannot control, are unable to obtain that testimony which will establish their rights. If this difficulty be produced by the legislative power, the same power might provide a remedy; but courts cannot, on that account, insert in the statute of limitations, an exception which the statute does not contain. *It has never been determined, that the impossibility of bringing a case to a successful issue, from causes of uncertain duration, though created by the legislature, shall take such case out of the operation of the act of limitations, unless the legislature shall so declare its will.* [Emphasis added.]

The error of the *Howard* and *Willhite* decisions in failing to give effect to the plain terms of 38 U. S. C. 445 is brought into still sharper focus by a series of recent decisions of this Court involving the construction and application of the limitations provisions of various federal statutes which created new causes of action. In each instance, the complaining party sought to avoid the terms of the statute on the ground that, as a practical matter, literal application would result in the substantial reduction, if not the total elimination, of the period during which suit could be brought on the cause of action. And, in each instance, this Court held unequivocally that the statute must be applied as written. *Pillsbury* v. *United Engineering Co.*, 342 U. S. 197; *Unexcelled Chemical Corp.* v. *United States*, 345 U. S. 59; *McMahon* v. *United States*, 342 U. S. 25. Cf. *United States* v. *Lindsay*, 346 U. S. 568.

The *United Engineering* case, *supra*, is especially revealing since it involved the limitations provisions of Section 13 (a) of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. 913 (a)), a statute which is to be liberally construed in favor of workmen and their families. *Balt. & Phila. Steamboat Co.* v. *Norton*, 284 U. S. 408, 414; *Voris* v. *Eikel*, 346 U. S. 328, 333. Section 13 (a) provides that "the right to compensation for disability under [the Longshoremen's Act] shall be barred unless a claim therefor is filed within one year after the injury". The claimants, who had filed more than one year after the injury, but within one year after the injury resulted in disability, contended that the word "injury" in the

statute must be taken to mean "disability." They relied, in this connection, upon Section 6 (a) of the Longshoremen's Act (33 U. S. C. 906 (a)) under which compensation is not recoverable unless and until the injury results in disability. The Ninth Circuit, however, rejected this suggested interpretation (187 F. 2d 987) and this Court affirmed, observing that (342 U. S. at 200), while the Longshoremen's Act is a humanitarian statute, "that does not give us the power to rewrite the statute of limitations at will, and make what was intended to be a limitation no limitation at all." The Court added (*ibid.*) that "[w]hile it might be desirable for the statute to provide as [claimants] contend, the power to change the statute is with Congress, not us." Thus, a longshoreman must file his claim within one year after his injury or be time-barred—even though during a part or all of that period the injury may not as yet be compensable.

The *Unexcelled Chemical* case, *supra,* involved Section 6 of the Portal-to-Portal Act of 1947 (29 U. S. C. 255), which provides that actions to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation or liquidated damages under the Fair Labor Standards Act of 1938, as amended (29 U. S. C. 201 *et seq.*), the Walsh-Healey Act (41 U. S. C. 35 *et seq.*), or the Bacon-Davis Act (40 U. S. C. 276a *et seq.*), must be brought within two years after the cause of action accrued. The United States argued, *inter alia,* that a cause of action under the Walsh-Healey Act accrues only after it is administratively determined that a violation of the Act

involved has occurred. It pointed out that such an administrative determination is the sole legal and practical basis for suit by the Attorney General to recover liquidated damages, and contended that, under the doctrine of "primary jurisdiction" (see *Far East Conference* v. *United States*, 342 U. S. 570), the administrative proceeding prescribed by the Walsh-Healey Act is an essential prerequisite to the filing of a suit in the district court. This Court nonetheless held that the cause of action accrued at the time of the violation giving rise to liability for liquidated damages (345 U. S. at 65–66):

> A cause of action is created when there is a breach of duty owed the plaintiff. It is that breach of duty, not its discovery, that normally is controlling. * * * The statutory liability accrued when the minors were employed. It was from that date that the period of limitations began to run.
>
> * * * * * *
>
> This construction, it is said, will prejudice the power of the United States to safeguard the public interest. But if there is prejudice it is the result of the Portal-to-Portal Act which Congress, having made, can refashion.

Finally, in the *McMahon* case, *supra*, the Court was called upon to construe Section 1 (a) of the Clarification Act (50 U. S. C. App. 1291 (a)), which states that the claim of a seaman against the United States for injuries and cure, "if administratively disallowed in whole or in part," may be enforced pursuant to the Suits in Admiralty Act—a statute which in turn provides (46 U. S. C. 745) that suit "may be brought

only within two years after the cause of action arises." The seaman's contention, supported by *Thurston* v. *United States*, 179 F. 2d 514 (C. A. 9), was that a cause of action does not arise until a court may entertain it,[11] and, accordingly, that his cause of action did not arise until the claim had been administratively denied. This Court held, however, that the period of limitations is to be computed from the date of the injury.[12]

The principles laid down in these cases are dispositive here. It is no answer, as the majority in *Willhite* thought (219 F. 2d at 348), that the *Howard* rule has been applied to suits on commercial life insurance policies. For one thing, the holding in *Howard* and in the commercial insurance cases *i. e.*, that the

[11] Compare the court's statement in the *Howard* case, *supra*, that a "*cause of action accrues when it becomes a present enforcible demand, when the party owning it is entitled to begin and prosecute an action thereon. It accrues at the moment he has a legal right to maintain an action to enforce it and the statute of limitations is then set in motion.* * * * respondent *did not have the legal right or ability to maintain an action upon the policy issued to her husband until the seven-year period had expired which enabled her to prove her husband's death.* Prior to that time she owned a cause of action, but it had not ripened into one that could be enforced" (28 F. Supp. at 986, emphasis in original).

[12] In *United States* v. *Lindsay*, 346 U. S. 568, this Court applied the normal meaning of the word "accrued" even though, by doing so, it gave retroactive effect to a statute of limitations. Section 4b (c) of the Commodity Credit Corporation Charter Act of June 29, 1948, as amended (15 U. S. C. 714b (c)), bars suit by or against the Corporation unless brought "within six years after the right accrued on which suit is brought". The Government sued Lindsay in 1952 to recover on a claim growing out of the alleged delivery of damaged wool to the Corporation in 1945. The Court held that the claim accrued on the date the right to sue came into existence, rather than on the date the act became effective, and that, as a consequence, the action was barred by limitations.

cause of action did not accrue until the expiration of seven years following disappearance, was bottomed on the proposition that recovery of the policy proceeds could be obtained on the basis of the insured's *presumed* death. See *Willhite,* 219 F. 2d at 348. As we have seen (*supra,* pp. 8–9), this is not true of petitioner's claim which is squarely (and, indeed, necessarily) rested on the premise that death took place some seven years prior to the date which would be fixed by indulgence of the statutory presumption. Moreover, whatever the merit of the decisions involving commercial insurance policies, as previously noted (*supra,* pp. 10–11) "[s]uits against the United States [on Government insurance] can be maintained only by permission, in the manner prescribed and subject to the restrictions imposed." *Munro* v. *United States, supra,* 303 U. S. at 41. Congress has defined the accrual of a cause of action for the purposes of National Service Life Insurance in terms of "the happening of the contingency on which the claim is founded" and has made no exception for situations like this one.[13] Assuming that "it might be desirable

[13] At the same time, Congress has provided in 38 U. S. C. 445 for the suspension of the running of the six year period in other specified situations. Thus, the time is tolled while a claim is pending with the Veterans Administration. Persons suffering under a legal disability have three years after the removal of the disability in which to bring suit. If a suit is seasonably begun and fails for defect in process, or for other reasons not affecting the merits, a new action may be brought within a year, though the period of limitations has elapsed.

In the circumstances, it is apparent that, if Congress had wished to do so, it well knew how to suspend the running of the limitations period with respect to disappearance cases.

for the statute to provide as [petitioner] contend[s], the power to change the statute is with Congress * * *." *Pillsbury* v. *United Engineering Co., supra,* 342 U. S. at 200.[14]

3. While it is a matter for Congress, rather than the courts, to determine whether exceptions should be written into the statute of limitations, we point out briefly that there are important considerations of policy supporting the present law. As already observed, where no premiums are paid on the policy subsequent to the insured's disappearance, recovery of the proceeds is wholly dependent upon a showing that the insured's death virtually coincided with that disappearance. And, in no event, can the lapse of seven years following the disappearance be taken as constituting, by itself, such a showing. No matter how long the insured may have been inexplicably absent, the question remains whether the circumstances surrounding his disappearance permit the inference that death occurred at the inception of the absence rather than at some later point. See pp. 26–36, *infra.*

When suit is instituted—as 38 U. S. C. 445 requires—within six years of the purported disappear-

[14] It should be observed that, in the past, Congress has changed the statute where it thought change desirable. Thus, when Congress clarified the definition of "disagreement" in 38 U. S. C. 445, it gave to plaintiffs, whose suits had been dismissed for failure to show the existence of a disagreement, three months in which to reinstate their suits (49 Stat. 1, 38 U. S. C. 445c). And when Congress provided that a claimant shall have ninety days after the denial of a claim in which to bring suit even though the period of limitations might earlier elapse, it provided for reinstatement of the suits of plaintiffs who had not had the full ninety days (49 Stat. 2034, 38 U. S. C. 445d).

ance and death of the insured, it may well be that the Government will still be in a position not only to ascertain whether the beneficiary's allegations in this regard are true, but also to obtain the evidence necessary to refute those assertions which it has reason to believe do not accord with fact. If the limitations period were to be drastically extended in the fashion petitioner suggests, the purpose served by 38 U. S. C. 445 would be impaired. It is a virtual certainty that during an interval of thirteen years, there would be a sufficient "loss of evidence from death of some witnesses, and the imperfect recollection of others, or the destruction of documents" to make difficult, if not impossible, the determination of the actual state of affairs. Cf. *Riddlesbarger* v. *Hartford Ins. Co.*, 7 Wall. 386, 390; *United States* v. *Oregon Lumber Co.*, 260 U. S. 290, 299.

The situation in this case presents an apt example. Petitioner's complaint contains numerous allegations with respect to such matters as the insured's physical and mental condition in 1943, his relations with his family at that time, and the post-disappearance efforts to locate him. Assuming that proof of these allegations would permit the inference that the insured's death coincided with his disappearance (but see pp. 28–36, *infra*), it cannot be said that, when suit was brought in 1954 (eleven years thereafter), the Government still possessed a reasonable opportunity to make an independent examination into their correctness. Furthermore, while the complaint does not state when and where the insured was last seen—or, for that matter, refer to other facets of the insured's

life in the military service—it is evident that those matters would also be relevant to a determination of the reason for his disappearance. No extended discussion is necessary to show the difficulties attendant upon any effort, initiated many years after the pertinent events, to reconstruct all of the relevant circumstances.

II. THE FACTS ALLEGED IN PETITIONER'S COMPLAINT ARE INSUFFICIENT TO PERMIT A FINDING THAT THE INSURED DIED BEFORE THE POLICY LAPSED

Even if this Court should decide that this action was not barred by limitations, petitioner's complaint was properly dismissed. As both courts below correctly held, were petitioner to establish the alleged facts with respect to the circumstances surrounding the insured's disappearance, there still would be insufficient basis to submit to a jury the question whether the insured died on or about the date of that disappearance.

A. UNDER THE NATIONAL SERVICE LIFE INSURANCE ACT, THE INSURED IS PRESUMED TO HAVE DIED AT THE EXPIRATION OF THE SEVEN YEAR PERIOD FOLLOWING HIS DISAPPEARANCE AND NOT BEFORE

At common law, the continuous and unexplained absence of an individual for a period of seven years gave rise to a presumption of the fact of death; it did not fix the precise time that death occurred. See, *e. g.*, *Davie* v. *Briggs*, 97 U. S. 628; *McCune* v. *United States*, 56 F. 2d 572 (C. A. 6); *Occidental Life Insurance Co.* v. *Thomas*, 107 F. 2d 876 (C. A. 9); *Mutual Life Insurance Co. of N. Y.* v. *Hamilton*, 143 F. 2d 726 (C. A. 5), certiorari denied, 323 U. S. 760;

Westphal v. *Kansas City Life Insurance Co.*, 126 F. 2d 76 (C. A. 7), certiorari denied, 316 U. S. 705; *Jones* v. *Metropolitan Life Insurance Co.*, 116 F. 2d 555 (C. A. D. C.). "* * * the time of death, whenever it is material, must be a subject of distinct proof." *Davie* v. *Briggs, supra*, 97 U. S. at 634. It follows that, even were it applicable to National Service Life Insurance claims, petitioner could not rest upon the common law presumption of death alone. While the insured's death at some point during the seven year period could be presumed, the period of absence in itself would permit no inference that he died while the policy was in effect, *i. e.*, at the beginning of the period.

Moreover, contrary to petitioner's position (Br. p. 13), Section 610 of the National Service Life Insurance Act, 38 U. S. C. 810, *infra*, p. 39, which concededly governs this case, does not adopt the common law rule enunciated in *Davie* v. *Briggs*. The Section inescapably declares that the death of the insured serviceman is presumed "as of the date of the expiration" of the seven year period.[15] This is, in effect, a codification, for National Service Life Insurance purposes, of the principle laid down in a number of cases that the presumption of continuing life during the period of absence is not affected by the presumption of death which arises at the end of the seven years. See, *e. g.*, *In re Chicago and N. W.*

---

[15] As the district court noted (R. 5), a similar provision, relating generally to claims for benefits under laws administered by the Veterans Administration, appears in 38 U. S. C. 32a.

Ry Co., 138 F. 2d 753, 755 (C. A. 7), certiorari denied *sub nom., Roth* v. *Carlson*, 321 U. S. 789; *United States* v. *O'Brien*, 51 F. 2d 37, 42 (C. A. 4); *English* v. *United States*, 25 F. 2d 335, 336 (D. Md.).

In short, as we have noted in Point I, it is only when the insurance has not lapsed prior to the end of the seven years that the beneficiary obtains support from the statutory presumption. In the instant case—a case in which the policy was permitted to lapse—the beneficiary must overcome the presumption that life continued during the period by introducing substantial evidence to the contrary. For the presumption of life ceases only if there are facts alleged and proved which are sufficient to sustain a finding that the insured died at an earlier date. Cf. *New York Life Insurance Co.* v. *Gamer*, 303 U. S. 161, 170–171. In this case, the petitioner, in order to prevail, must show that the earlier date at which the insured died was the time of his disappearance in the summer of 1943.

B. THE SPECIFIC FACTS ALLEGED DO NOT PERMIT AN INFERENCE THAT THE INSURED DIED AT THE TIME OF HIS DISAPPEARANCE, RATHER THAN AT SOME LATER POINT

The ultimate inquiry on this aspect of the case is whether, assuming the truth of the allegations of the complaint, there would be sufficient evidence to submit to the jury the question whether the insured died when he disappeared rather than at some later time. We submit that the answer to this question is in the negative.

1. The character of the proof necessary to permit a court or jury to draw the inference that death

occurred at the inception of an absence has been delineated by this Court on two occasions. In *Davie* v. *Briggs, supra,* the Court laid down the so-called "specific peril" rule, *viz.*, if it appears that the absentee encountered some specific peril, or came within the range of some pending or immediate danger which might reasonably be expected to destroy life, the trier of fact may conclude that he succumbed to that peril or danger (97 U. S. at 634). Later, in *Fidelity Mutual Life Ass'n* v. *Mettler,* 185 U. S. 308, 319, the Court held that, although exposure to a particular peril is not shown, the inference of death may be drawn where the established facts are inconsistent with a continuation of life.

In both of the above cases, as well as in virtually all subsequent decisions applying their principles to sustain a finding that death occurred at a particular point prior to the conclusion of seven years, there was abundant evidence respecting the circumstances surrounding disappearance. If believed, this evidence either (1) sustained the inference that the absentee had fallen victim to a specific peril that confronted him when last seen, or (2) pointed strongly to death at a given time and place. And, in each instance, the evidence further provided an explanation for the failure of the absentee's body to come to light.

In *Davie* v. *Briggs, supra,* for example, the absentee was a member of a pioneer group which had undertaken to cross the United States in 1851. En route, the group passed through lands occupied by hostile Indians. After several encounters with these Indians, some of the pioneers turned back; the balance, in-

cluding the absentee, expressed a resolve "to pass on and fight their way across the country." None of the latter were ever heard of again.

In *Fidelity Mutual Life Ass'n v. Mettler*, *supra*, the absentee had departed from his home to make proof of a section of land. When he did not return within the expected time, a searching party was dispatched. The searchers followed the trail of the absentee's wagon and found it abandoned at a point where he had camped near a river. His bed, which had been slept in, was on the ground; cooking utensils and food lay about; and his gun was leaning against a wagon wheel. One of his two horses lay dead close to a bush to which it had been tied; the other horse was seen wandering in the vicinity with a rope around its neck. Further investigation revealed footprints, identified as those of the absentee, leading down to the water but not returning therefrom. And, finally, there were marks along the bank of the river indicating that he had fallen into the water.

In *Penn Mutual Life Insurance Co.* v. *Tilton*, 84 F. 2d 10 (C. A. 10), the absentee had gone into a mountainous portion of Mexico which was occupied and controlled by marauding bandits. When last seen he was in the company of two men who later confessed that they had murdered him and disclosed the location of his body. Although they apparently did not specify when the murder took place, the court observed that, in the circumstances, the inference could be drawn that death had occurred within a month after his disappearance.

In *Occidental Life Insurance Co.* v. *Thomas*, 107 F. 2d 876 (C. A. 9), the evidence revealed these circumstances: (1) the absentee, a successful minister and devoted family man who was known to be a poor swimmer, had been last observed at dusk fishing from a small row boat in a large lake; (2) the following morning, the boat was discovered at a distance of 100 yards from shore and approximately three-fourths of a mile from where the absentee had been last seen; (3) upon inspection of the boat, it was found that the trolling line that the absentee had used was extended out into the water, that the absentee's overcoat was hanging over the side, and that his fishing rod was missing entirely although his cover and tackle box remained; (4) the lake was dragged without result, but it was so deep in places that the grapple hooks did not reach the bottom; and (5) an extensive search along the shores of the lake revealed no evidence that the absentee had debarked upon land. As the Ninth Circuit recognized (107 F. 2d at 879), these facts, taken together, pointed "with *at least fair probability* to the [absentee's] having perished in the lake." [Emphasis added.]

In *Brownlee* v. *Mutual Ben. Health & Accident Ass'n*, 29 F. 2d 71 (C. A. 9), the absentee was last seen descending Mt. Hood, Oregon, at an elevation of between 9,000 and 10,000 feet. A raging snowstorm was in progress and visibility was very poor. Further, there were many crevasses of snow and ice, as well as canyons, into which the absentee could have fallen. During a severe storm, these crevasses were not readily observable.

In *United States* v. *Hayman*, 62 F. 2d 118 (C. A. 5), relied upon by petitioner (Br. p. 6), the insured was suffering from an ailment which made him subject to sudden death at any time. This, in the opinion of the Fifth Circuit, constituted a "specific peril", as that term was used by this Court in *Davie* v. *Briggs*, *supra*. Moreover, when last seen, the insured was, as the court put it (62 F. 2d at 120), "a stranger in a community of strangers crowded with a floating population working and seeking work on the great river project" at Muscle Shoals—a circumstance which tended to explain the non-discovery of his purported death. While we subscribe to the view of the dissenting judge in *United States* v. *Willhite*, 219 F. 2d. 343 (C. A. 4), that there was insufficient evidence on which to base a finding that the absence of the insured in that case was the consequence of death (rather than desertion), as the majority noted he had communicated to several individuals his intent to commit suicide.

2. In sharp contrast to the situation in each of the above cases, the alleged circumstances surrounding the insured's disappearance in the instant case leave no basis for selecting death on or about July 30, 1943, as a more reasonable explanation of the disappearance than a variety of other possible explanations. The allegations of the complaint are not inconsistent with the continuation of the insured's life for at least the two months intervening between the date of disappearance and the date the policy lapsed; nor is there an averment disclosing that the insured, when last seen, was confronted by a specific and im-

mediate peril within the meaning of *Davie* v. *Briggs*, *supra*.

To be sure, at the time of his disappearance, the insured allegedly had been permanently and totally disabled over a protracted period of time by reason of various disorders. Accepting, for present purposes, the truth of these allegations (notwithstanding their apparent inconsistency with the fact that petitioner had been engaged in basic infantry training during a period when it is alleged that he was totally disabled), they still permit of no definite conclusion as to the time of the insured's death.

Although not spelled out in the complaint, petitioner's reliance on the insured's purported afflictions must rest on this theory: That, on July 30, 1943, one or more of his afflictions suddenly became so severe that the insured was driven to foresake the customary procedure of reporting on sick call in favor of leaving his unit altogether; that, once having departed, the insured soon died—without, however, being observed by anyone in the interval; and that death took place in some location where, in the normal course of events, his remains were not discovered.

We submit that, even under the broadest interpretation of the common law rule, petitioner plainly would not be entitled to submit such an improbable hypothesis to a jury for its consideration.[16] For the accept-

[16] Among other things, this Court can take judicial notice of the fact that Camp Wheeler is located near Macon, Georgia, far removed from the Atlantic Ocean or any other sizable body of water in which the insured might possibly have drowned. See 18 *Encyclopedia Americana* (1944 ed.), p. 88. If the insured

ance of this theory unquestionably would involve resort by the trier of fact to pure speculation and conjecture. This is especially true since the allegations of the complaint, taken as a whole, just as readily will support the theories: (1) that the insured deserted to avoid overseas duty (it is significant that his disappearance is alleged to have coincided with the transfer of his unit to the West Coast),[17] or (2) that the insured left his unit in a mentally disturbed condition but did not die until some time thereafter.[18]

The instant case may be compared to *English* v.

---

died shortly after his disappearance, it therefore must be assumed that this event took place on land. It is reasonable to suppose that nowhere, except in the most desolate wilderness area, will the body of a soldier go long undiscovered or unidentified. And it is to be noted in this connection that the complaint alleges that the Army "made every effort to locate [the insured] or to have intelligence or tidings of him" and that "the Federal Bureau of Investigation has also sought to locate him" (R. 1).

[17] On the hypothesis that the insured deserted, his failure to communicate with his family would hardly be surprising. Wartime desertion was a capital offense when the insured disappeared in 1945, and it is not subject to any statute of limitations. See *Manual for Courts-Martial, 1928*, Articles of War 39, 58. The frequency of desertion is attested by the fact that in the fiscal year 1955 alone, the Federal Bureau of Investigation located 6,148 deserters and accomplices. When an absence stems from desertion, or from a desire to avoid prosecution of punishment for an offense, the presumption of death, it may be noted, would be of doubtful force at best. Cf. *McNulty* v. *General American Life Ins. Co.*, 153 Pa. Super. 288, 33 A. 2d 796; *Thetford* v. *Modern Woodmen of America*, 273 S. W. 666 (Civ. App., Tex.).

[18] Indeed, even if petitioner were in a position to rely upon the presumption of death at the end of seven years (Section 610), these hypotheses could well lead to the conclusion that the absence was not "unexplained," as required by Section 610.

United States, 25 F. 2d 335 (D. Md.), in which a showing much stronger than that which petitioner offers to make was held insufficient to rebut the presumption of continuing life—the same presumption which is adopted by statute in this case. There, the insured serviceman became shell-shocked while engaged in combat in France, and was discharged from the military service on April 12, 1919, with a mental disorder. During the ensuing weeks, he became very despondent concerning his physical and mental condition. On April 28, 1919, having been advised by doctors that he never would regain his health, he stated that he had nothing to live for. He thereupon forwarded all of his personal belongings to his stepmother (whom he had supported and with whom he had communicated frequently) and disappeared. A diligent search by friends, relatives, the American Red Cross and the American Legion failed to disclose any information as to his whereabouts. In 1926, seven years after the disappearance, a state probate court granted letters testamentary on his estate and, the following year, the same court fixed April 28, 1919, as being the date of death. The stepmother then brought suit to recover benefits on the serviceman's war risk insurance policy, which had remained in effect until July 1, 1919.

The court determined that the circumstances surrounding the disappearance of the insured did not support the probate court's finding of death during the life of the policy. Noting that "when one is not content to rest his case upon the common-law presumption of death, arising from absence, but seeks to establish a date of death prior to the end of seven years,

he must produce additional evidence," it went on to observe that (25 F. 2d at 337):

> In the case at bar, the additional facts are not sufficient, in the opinion of the court, to show that the insured died before the policy expired. The policy lapsed only sixty-four days after the insured disappeared. The insured was of unsound mind. Whether he died before or after the significant date is purely a matter of speculation, which cannot be determined with certainty. *It does not seem possible to infer that death followed disappearance within two months,* from the failure of an absentee of unsound mind to communicate with his family and furnish them customary support, even though he was weak in body, despondent in mind, and believed that his afflictions were beyond hope of recovery. The ordinary presumption is that life continued during the seven-year period, and the circumstances of this case do not so materially quicken the operation of time. There was no justification * * * for the finding of the [probate court] that death occurred on the day when the insured was last seen, for it does not appear that the [probate court] had any other evidence than that heretofore disclosed. [Emphasis added.]

And cf. *United States* v. *Robertson*, 44 F. 2d 317 (C. A. 9); *McCune* v. *United States*, 56 F. 2d 572 (C. A. 6).[19]

[19] Since petitioner places no reliance in her brief on the state court finding that the death of the insured occurred on the date of disappearance, we need not consider it at length here. Apart from the fact that this finding in no circumstance could be invoked as *prima facie* evidence of death since the United States was a stranger to the chancery court proceeding (cf.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be affirmed.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
GEO. S. LEONARD,
SAMUEL D. SLADE,
ALAN S. ROSENTHAL,
Attorneys.

JANUARY 1957.

Mutual Ben. Life Ins. Co. v. *Tisdale*, 91 U. S. 238), 38 U. S. C. 810, *infra*, p. 39, expressly precludes the application of presumptions of death arising under state law.

APPENDIX

1. The relevant provisions of the National Service Life Insurance Act of 1940, 54 Stat. 1008, as amended, 38 U. S. C. 801 *et seq.* are as follows:

Section 602 (n) [38 U. S. C. 802 (n)]

Upon application by the insured and under such regulations as the Administrator may promulgate, payment of premiums on such insurance may be waived during the continuous total disability of the insured, which continues or has continued for six or more consecutive months, if such disability commenced (1) subsequent to the date of his application for insurance, (2) while the insurance was in force under premium-paying conditions, and (3) prior to the insured's sixtieth birthday: *Provided,* That upon application made within one year after the date of enactment of the Insurance Act of 1946 [August 1, 1946] the Administrator shall grant waiver of any premium becoming due not more than five years prior to the date of enactment of such Act which may be waived under the foregoing provisions of this subsection: *Provided further,* That the Administrator, upon any application made subsequent to one year after the date of enactment of the Insurance Act of 1946 [August 1, 1946], shall not grant waiver of any premium becoming due more than one year prior to the receipt in the Veterans' Administration of application for the same, except as hereinafter provided. * * * *Provided further,* That in any case in which the Administrator finds that the insured's failure to make timely application for waiver of premiums or his failure to submit satisfactory evidence of the existence or continuance of total disability was due to circum-

stances beyond his control, the Administrator may grant waiver or continuance of waiver of premiums: *And provided further,* That in the event of death of the insured without filing application for waiver, the beneficiary, within one year after the death of the insured or the enactment of this amendment [August 1, 1946], whichever be the later, or, if the beneficiary be insane or a minor, within one year after removal of such legal disability, may file application for waiver with evidence of the insured's right to waiver under this section. * * *

Section 610 [38 U. S. C. 810]

No State law providing for presumption of death shall be applicable to claims for National Service Life Insurance. If evidence satisfactory to the Administrator is produced establishing the fact of the continued and unexplained absence of any individual from his home and family for a period of seven years, during which period no evidence of his existence has been received, the death of such individual as of the date of the expiration of such period may, for the purposes of this part, be considered as sufficiently proved.

Section 617 [38 U. S. C. 817]

In the event of disagreement as to any claim arising under this Act, suit may be brought in the same manner and subject to the same conditions and limitations as are applicable to the United States Government life (converted) insurance under the provisions of sections 19 and 500 of the World War Veterans Act, 1924, as amended.

2. The relevant provisions of Section 19 of the World War Veterans Act, 1924, 43 Stat. 612, as amended, 38 U. S. C. 445, are as follows:

In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the Veterans' Administration and any person or persons

claiming thereunder an action on the claim may be brought against the United States either in the United States District Court for the District of Columbia or in the district court of the United States in and for the district in which such persons or anyone of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. * * *

No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after the date of approval of this Amendatory Act [July 3, 1930], whichever is the later date, and no suit on United States Government life (converted) insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made: *Provided,* That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: *Provided further,* That this limitation is suspended for the period elapsing between the filing in the Veterans' Administration of the claim sued upon and the denial of said claim by the Administrator of Veterans' Affairs. Infants, insane persons, or persons under other legal disability, or persons rated as incompetent or insane by the Veterans' Administration shall have three years in which to bring suit after the removal of their disabilities. If suit is seasonably begun and fails for defect in process, or for other reasons not affecting the merits, a new action, if one lies, may be brought within a year though the period of limitations has elapsed. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1937